

REMARKS

In response to the above-identified Office Action, Applicant traverses the Examiner's rejection to the claims and seeks reconsideration thereof. Claims 1-15 are now pending in the present application. In this response, Claims 1, 6, 9 and 15 have been amended, no claims have been added and no claims have been cancelled.

The instant application is directed to a composition comprising, a glycol, a silicone, a quaternium and a polymer viscosity modulator.

I. Claim Amendments

Applicant respectfully submits the attached amendments to the claims in which claims 1, 6, 9 and 15 are amended. Claims 9 and 15 are amended to overcome the Examiner's rejection of these claims under 35 U.S.C. §112 as will be discussed more fully below. Claim 1 is amended to clarify that the silicon is present in an amount of "2% to 30 % by weight." The amendment to claim 1 was recited in original claim 6 and is therefore supported by the application. Claim 6 is amended to delete the range of about 2% to about 30 % by weight and instead recite that the silicon is present in an amount of "about 4% to about 30%." Support for the amendment is found, for example, on pages 6-8, Examples 1-3. Thus, the amendments to the claims do not add new matter. In view of the foregoing, Applicant respectfully requests consideration and entry of the amendments to claims 1, 6, 9 and 15.

II. Claim Rejections – 35 U.S.C. §112, second paragraph

A. In the outstanding Office Action, the Examiner rejects Claims 9 and 15 under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which the Applicant regards as the invention.

Applicant respectfully submits amendments to claims 9 and 15 to overcome the rejections raised by the Examiner. In particular, claim 9 is amended to clarify that the quaternium comprises a blend of behentrimonium methosulfate and cetearyl alcohol. Claim 15 has been amended to delete the term "about" found indefinite by the Examiner.

In view of the foregoing amendments, Applicant respectfully submits claims 9 and 15 are in compliance with 35 U.S.C. §112. Applicant respectfully requests withdrawal of the rejection of claims 9 and 15 under 35 U.S.C. §112, second paragraph.

III. Claim Rejections – 35 U.S.C. §102(b)

A. In the outstanding Office Action, claims 1, 2, 5-8 and 13-15 are rejected under 35 U.S.C. §102(b) as being anticipated by Flick, (Cosmetic and Toiletry Formulations). Applicant respectfully traverses the rejections.

In regard to claim 1, Flick fails to teach a composition including a quaternium and a silicone in an amount of 2% to about 30% by weight of the composition as required by claim 1. The Examiner alleges a mixture of 4.76% glycerin (glycol), 1.43% veegum and 0.29% xanthan gum (polymeric viscosity modifiers), 1.43% dimethicone, 7.14% glycolic acid, 63.51% water and cetyl alcohol teaches each of the elements of claim 1. See Action, page 3. The Examiner, however, fails to point to, and Applicant is unable to discern, any of the listed ingredients teaching a quaternium. Moreover, the dimethicone (i.e. silicone) is not present in an amount of 2% to 30% as required by claim 1. Accordingly, Flick fails to teach at least these element of claim 1. Since Flick fails to teach all the elements of claim 1, anticipation may not be found. For at least the foregoing reasons, Applicant respectfully requests reconsideration and withdrawal of the rejection of claim 1 under 35 U.S.C. §102.

In regard to claim 15, similar to claim 1, claim 15 recites a composition comprising a quaternium. Thus, for at least the reasons discussed in regard to claim 1, Flick fails to anticipate claim 15.

In addition, claim 15 recites the elements of rubbing the skin to distribute the composition over the skin and leaving the composition on the skin. Flick further fails to teach these elements. The Examiner recognizes the failure of Flick to expressly teach these elements and instead alleges Applicant's claimed topical application would be inherently found within the reference. Applicant respectfully disagrees with the Examiner's conclusion. The Doctrine of Inherency requires that the inherent element is necessarily found within the reference, not that it may or could be. Flick suggests nothing more about the use of the composition than that it is for treatment and rejuvenation of the skin. There are many methods in which a composition for treating

skin may be applied. For example, the composition may be applied to the skin as a spray or dispersed within, for example, a bath, and soaked in by the user. In either case, rubbing of the skin would not be required in order to distribute the composition. In addition, such a skin composition may be applied and then washed away or rubbed off to prevent over treatment of the skin. Thus, in as much as the skin treatment composition of Flick may be applied to the skin without rubbing and/or removed after application, the elements of rubbing the skin to distribute the composition over the skin and leaving the composition on the skin are not inherently found within the reference. Since Flick fails to teach all the elements of claim 15, anticipation may not be found. For at least the foregoing reasons, Applicant respectfully requests reconsideration and withdrawal of the rejection of claim 15 under 35 U.S.C. §102.

In regard to claims 2, 5-8 and 13-14, these claims depend from claim 1 and incorporate the limitations thereof. Thus, for at least the reasons discussed in regard to claim 1, Flick fails to teach each and every element of claims 2, 5-8 and 13-14. For at least the foregoing reasons, Applicant respectfully requests reconsideration and withdrawal of the rejection of claim 2, 5-8 and 13-14 under 35 U.S.C. §102.

B. In the outstanding Office Action, claims 1-5 and 7 are rejected under 35 U.S.C. §102(b) as being anticipated by U. S. Patent No. 4,818,523 issued to Clarke et al ("Clarke"). Applicant respectfully traverses the rejections.

In regard to claim 1, Clarke fails to teach at least the element of a silicone in an amount of 2% to 30% by weight of the composition as required by claim 1. The Examiner states Clarke teaches a silicone without identifying any particular amount of silicone. Thus the Examiner has failed to point to, and Applicant is unable to discern a portion of Clarke teaching a silicone in an amount of about 2% to 30% by weight of the composition. Since Clarke fails to teach all the elements of claim 1 anticipation may not be found. For at least the foregoing reasons, Applicant respectfully requests reconsideration and withdrawal of the rejection of claim 1 under 35 U.S.C. §102.

In regard to claims 2-5 and 7, these claims depend from claim 1 and incorporate the limitations thereof. Thus, for at least the reasons discussed in regard to claim 1, Clarke fails to teach each and every element of claims 2-5 and 7. For at least the

foregoing reasons, Applicant respectfully requests reconsideration and withdrawal of the rejection of claims 2-5 and 7 under 35 U.S.C. §102.

C. In the outstanding Office Action, claims 1, 7, 10, 13 and 14 are rejected under 35 U.S.C. §102(b) as being anticipated by U. S. Patent No. 6,927,205 issued to Patt, et al ("Patt"). Applicant respectfully traverses the rejections.

In regard to claim 1, Patt fails to teach at least the element of a silicone in an amount of 2% to 30% of the composition as required by claim 1. The Examiner has failed to point to, and Applicant is unable to discern, a portion of Patt teaching a silicone in an amount of 2% to 30% of the composition. Since Patt fails to teach all the elements of claim 1 anticipation may not be found. For at least the foregoing reasons, Applicant respectfully requests reconsideration and withdrawal of the rejection of claim 1 under 35 U.S.C. §102.

In regard to claims 7, 10, 13 and 14, these claims depend from claim 1 and incorporate the limitations thereof. Thus, for at least the reasons discussed in regard to claim 1, Patt fails to teach each and every element of claims 7, 10, 13 and 14. For at least the foregoing reasons, Applicant respectfully requests reconsideration and withdrawal of the rejection of claims 7, 10, 13 and 14 under 35 U.S.C. §102.

IV. Claim Rejections – 35 U.S.C. §103(a)

A. In the outstanding Office Action, claims 1, 5, 7-9, 11-14 are rejected under 35 U.S.C. §103(a) as being unpatentable over U. S. Patent No. 6,709,663 issued to Espinoza ("Espinoza"). Applicant respectfully traverses the rejections.

To establish a *prima facie* case of obviousness, the Examiner must show that the cited reference teaches or suggests each of the elements of a claim. Hindsight reconstruction may not be used to modify the reference to meet the claimed invention. MPEP §2145. Furthermore, the fact that the claimed invention is within the capabilities of one of ordinary skill in the art, without some showing of an objective reason for modifying the reference to arrive at the claimed invention, is not sufficient to establish a *prima facie* case of obviousness. *In re Kotzab*, 217 F.3d 1365, 1371, 55 USPQ2d 1313, 1318 (Fed. Cir. 2000).

In regard to claim 1, Espinoza fails to teach or suggest a composition including the claimed elements of a silicone in an amount of 2% to 30%, quaternium and a polymer viscosity modulator. The Examiner admits Espinoza fails to disclose a specific formulation incorporating a polymer viscosity modulator as claimed. See Action, page 5. The Examiner further fails to point to, and Applicant is unable to discern, a portion of the reference teaching a formulation further including a quaternium and a silicone in an amount of 2% to 30% as recited in claim 1. Since Espinoza fails to teach or suggest all the elements of claim 1, a *prima facie* case of obviousness may not be established. For at least the foregoing reasons, Applicant respectfully requests reconsideration and withdrawal of the rejection of claim 1 under 35 U.S.C. §103.

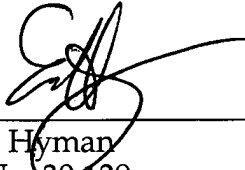
In regard to claims 5, 7-9. 11-14, these claims depend from claim 1 and incorporate the limitations thereof. Thus, for at least the reasons discussed in regard to claim 1, Espinoza fails to teach or suggest each and every element of claims 5, 7-9. 11-14. For at least the foregoing reasons, Applicant respectfully requests reconsideration and withdrawal of the rejection of claims 5, 7-9. 11-14 under 35 U.S.C. §103.

CONCLUSION

In view of the foregoing, it is believed that all claims now pending, namely Claims 1-15, are now in condition for allowance and such action is earnestly solicited at the earliest possible date. If there are any additional fees due in connection with the filing of this response, please charge those fees to our Deposit Account No. 02-2666. Questions regarding this matter should be directed to the undersigned at (310) 207-3800.

Respectfully submitted,
BLAKELY, SOKOLOFF, TAYLOR, & ZAFMAN LLP

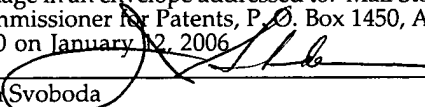
Dated: 1/12/06

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I hereby certify that this correspondence is being deposited with the United States Postal Service as First Class Mail with sufficient postage in an envelope addressed to: Mail Stop Amendment, Commissioner for Patents, P.O. Box 1450, Alexandria, Virginia 22313-1450 on January 12, 2006.


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